

Chapter 2: FINDING THE RIGHT BOX

The starting point for determining a guideline-compliant sentence, *see* § 7.3, for each conviction is:

- (a) the Offense Severity Group of the offense of conviction; and
- (b) the criminal history score of the offender.

The place where these two factors intersect on either the Master Grid or the Drug Grid is the box that contains the sentencing options for that particular combination of offense and offender. We will discuss these elements of sentencing first and then talk about the options within a box, expanding the box, sentencing outside of the box, and how the boxes fit together in multiple count cases.

2.1 Offense Severity Group

The offense(s) of conviction will be determined by the plea agreement or the verdict. Once the offense(s) of conviction are set, the parties and the court need only refer to Appendix C. Appendix C is a chart that has all of the felonies that may be prosecuted in the District of Columbia arranged in alphabetical order by common name. Column 4 of that chart provides the Offense Severity Group for each offense. Alternatively, Appendix D is a chart that has the most common felonies that are prosecuted in the District of Columbia arranged by Offense Severity Group.

The Offense Severity Group determines into which row a conviction falls for sentencing purposes. Thus, for example, aggravated assault, found on page 1 of Appendix C, is in Offense Severity Group 6 on the Master Grid (“Master-6”). Distribution of a Controlled Substance, found on page 5 of Appendix C, is in Offense Severity Group 2 on the Drug Grid (“Drug-2”).

There should be no question about the group in which an offense is ranked. However, the Commission is aware that some offenses can be committed in vastly different ways. Obstruction of justice is one; robbery is another. Over the course of time, the Commission may move offenses into different groups to accommodate these differences. In the meantime, judges and practitioners should not, except in circumstances that are controlled by a departure principle (*see* Chapter 5), use a group different from the one in which the offense of conviction falls. If a judge or practitioner finds that an offense or a common method of committing an offense should be ranked differently, it would be most helpful if he or she would pass that observation on to the Commission.

The Offense Severity Groups on the Master Grid are arranged in order from the most serious offenses in Group 1 (e.g., First Degree Murder) to the least serious offenses in Group 9 (Receiving Stolen Property) and on the Drug Grid from Group 1 (Distribution/PWID of a Controlled Substance While Armed) to Group 3 (Attempted Distribution/PWID of a Controlled Substance).

Note: The offense of conviction and not the real offense conduct controls the Offense Severity Group although real offense conduct can be considered in determining where a person should be sentenced within the prison range and in assessing whether a departure should apply. For example, if the defendant committed an armed robbery with a knife but was found guilty of or pled guilty to unarmed robbery, he would be in Group 6 and not in Group 5. Nevertheless, the judge could take the knife into account in considering where in Group 6 to sentence the defendant.

2.2 Criminal History Score

A defendant's criminal history determines into which column a conviction falls for sentencing purposes. There are 5 columns along the horizontal axis, starting with zero to one-half (0 - ½) criminal history points through six-plus (6+) criminal history points.

Scoring a defendant's criminal history depends on the following factors:

- (a) prior convictions/adjudications, *see* § 2.2.1;
- (b) whether the prior conviction/adjudication was a felony or misdemeanor; *see* §§ 2.2.2, 2.2.3, 2.2.4;
- (c) the Offense Severity Group of the prior felony convictions or adjudications, *see* § 2.2.2;⁵
- (d) the number of events encompassed in a single case, *see* § 2.2.5;
- (e) whether the prior offense was a criminal conviction or a juvenile adjudication, *see* §§ 2.2.2, 2.2.3, 2.2.4;
- (f) the date on which a sentence or disposition was entered or the date on which a sentence was completed relative to the commission of the crime in the instant case, *see* §§ 2.2.2, 2.2.3, 7.2.

Note: The defendant may not use the sentencing process in one case to collaterally attack his conviction or sentence in another case. For example, if a defendant's prior conviction is scored for criminal history purposes to determine a "guideline sentence," the defendant may not challenge the validity (as opposed to the existence) of that conviction based on grounds that might otherwise support a collateral attack on the prior conviction.

2.2.1 What is a Prior Conviction or Adjudication?

A prior conviction or adjudication is any conviction or adjudication for which judgment (sentence or disposition) was entered before the day of sentencing in the instant case. The order in which the offenses were committed is irrelevant.

Sentences or dispositions that are entered on the same day as the sentencing in the case at issue are not prior convictions/adjudications. Therefore, they are not counted in computing the prior criminal history score.

2.2.2 Scoring Prior Convictions/Adjudications

The first step toward scoring an offender's criminal history is identifying all prior criminal convictions and juvenile adjudications. Convictions and adjudications are scored based upon their type and age. The criminal history score for convictions and adjudications is based upon the Offense Severity Group for that offense (e.g., a prior conviction for ADW is in Master Group 6, just as it is when the instant offense is ADW). Column 4 of Appendix C provides the Offense Severity Group for all felonies prosecuted under the D.C. Code.

Out-of-state and federal convictions should be matched as closely as possible to D.C. Code offenses by using the elements of the offense. *See* § 2.2.7.

⁵ Out-of-state convictions must be matched to D.C. offenses to determine their Offense Severity Group. *See* § 2.2.7.

Unless lapsed or revived, *see* § 2.2.3, § 7.15, prior convictions are scored as follows:

| | |
|----------|--|
| 3 points | Offenses in Master Grid Groups 1 through 5 |
| 2 points | Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1 |
| 1 point | Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3 |
| ¼ point | All misdemeanors (with a cap of 1 ½ points, that is, only six misdemeanor convictions may count toward the criminal history score, although <u>all</u> misdemeanor convictions may be considered by the judge in choosing the appropriate sentence within the applicable guideline box). |

Note: Sentences under the Youth Rehabilitation Act are counted like any other adult conviction for scoring purposes even if the prior YRA conviction was “set aside” for non-law enforcement purposes.

Unless lapsed, *see* § 2.2.4, prior juvenile adjudications are scored as follows:

| | |
|------------|---|
| 1 ½ points | Offenses in Master Grid Groups 1 through 5 |
| 1 point | Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1 |
| ½ point | Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3 |
| 0 points | All misdemeanors |

Juvenile adjudications are capped at 1 ½ points *unless* there is more than one adjudication for an offense in Master Grid Groups 1-5. In that case, each of the offenses in Master Grid Groups 1-5 counts for 1 ½ points and adjudications in Master Grid Groups 6-9 and Drug Grid Groups 1-3 are not counted in the criminal history score. As with convictions, all adjudications may be considered by the judge in choosing the appropriate sentence from the applicable guideline box.

2.2.3 Which Prior Convictions Count?

A prior *conviction* counts for scoring purposes if any portion of its sentence falls within the ten-year window. In other words, if the amount of time between the *completion of the sentence*⁶ for the prior conviction and the commission of the instant offense is 10 years or less, then the prior conviction counts for scoring purposes. For example, if the instant offense were committed on February 9, 2004, then a prior conviction for which parole was completed on February 10, 1994 (within the 10-year window) would count for criminal history scoring purposes.

A prior conviction lapses, that is, it is not scored, if its entire sentence is beyond the ten-year window. In other words, if the amount of time between the completion of the sentence for the prior conviction and the commission of the instant offense is more than 10 years, then the prior conviction lapses. For example, if the instant offense were committed on February 9, 2004, then a prior conviction for which parole completed on February 8, 1994 (beyond the 10-year window) would be lapsed and would not count for criminal history scoring purposes.

Lapsed felony convictions can be revived, however. If any prior felony conviction falls within the ten-year window, then all lapsed felony convictions are revived. Lapsed convictions that have been revived by a felony in the ten-year window are scored as follows:

| | |
|----------|--|
| 3 points | Offenses in Master Grid Groups 1 through 5 |
| 1 points | Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1 |

⁶A sentence is completed when a person is sentenced, released from prison or finishes probation, parole or supervised release, whichever is latest. *See* § 2.2.7.

| | |
|----------|---|
| ½ point | Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3 |
| 0 points | All misdemeanors |

Thus, if the defendant has been sentenced or is serving a sentence (either in jail/prison or on probation, parole, or supervised release) for a *felony* at any time during the ten years before the commission of the instant offense, all felony convictions are scored. Felony convictions in the ten-year window are scored at their full value; lapsed felony convictions in Master Groups 1- 5 are also scored at their full value; and lapsed felony convictions in Master Groups 6 -9 and Drug Grid Groups 1-3 are scored at one-half their full value; lapsed misdemeanors are not scored at all. If, however, all previous sentences were completed more than ten years before the date of the commission of the instant offense, none of the prior convictions is scored.

As stated above, a prior conviction or adjudication is any conviction or adjudication for which judgment (sentence or disposition) was entered before the day of sentencing in the instant case. This means that sentences or dispositions that were entered after the commission of the instant offense but before sentencing of the instant offense are also scored. They are scored at full value. The order in which the offenses were committed is irrelevant. However, because sentencing of such a prior conviction did not fall within the 10-year window (i.e., the sentence was imposed after the commission of the instant offense), it cannot revive any lapsed felony convictions. Only felony convictions within the 10-year window can revive earlier felony convictions.

Example

Defendant committed an aggravated assault on 8/15/2003 and an armed carjacking on February 9, 2004. He was sentenced in the armed carjacking case first, on 7/23/2004, and in the aggravated assault case second, on 8/29/2004. The armed carjacking would be a prior conviction (Master Group 3) for determining the defendant's criminal history score when he was later sentenced in the aggravated assault case since the sentence was entered before the day of sentencing in the aggravated assault case. However, the armed carjacking cannot be used to revive an earlier robbery conviction for which the sentence was completed on 8/1/1993, more than ten years before the commission of the aggravated assault, because the conviction for armed carjacking did not occur in the 10-year-window prior to the commission of the aggravated assault. If the order of sentencing was reversed, the aggravated assault cannot be used to revive the earlier robbery conviction because the conviction for aggravated assault did not occur in the 10-year window prior to the commission of the armed carjacking. *See* § 9.12, Example 12, for a different result.

Prior convictions for misdemeanors lapse at the same rate as felonies (ten years) but misdemeanors can neither revive other convictions nor be revived. Thus, if the only offense in the ten-year window is a misdemeanor, it does not revive earlier felony offenses. If a sentence for a misdemeanor was completed more than ten years before the commission of the instant offense, it is not counted, regardless of the number of felony convictions within the ten-year window.

Note: While lapsed convictions are not counted or scored for criminal history purposes, the court may still consider them when determining where a defendant should be sentenced within the applicable box. There is no bar to prosecutors using a lapsed conviction as the basis to indict or file papers for a statutory enhancement.

2.2.4 Which Prior Adjudications Count?

Juvenile adjudications for offenses in Master Groups 6 -9 and all Drug Groups count if the amount of time between the date of disposition or date of release from Oak Hill or its functional equivalent, *see* § 7.19, whichever is latest, and the commission of the instant offense is 5 years or less. Juvenile adjudications for offenses in Master Groups 1 - 5 count if the amount of time between the date of disposition, the date of release from Oak Hill or its functional equivalent, or the date of release from a locked residential facility, whichever is later, and the commission of the instant offense is 5 years or less. If the defendant, as a juvenile, was placed in the locked unit of a multi-level facility then the defendant's entire stay at that facility is treated as if the defendant were in the locked unit unless the defendant can establish that he or she was transferred from the locked unit to a less secure unit and remained there until released from that facility.

Prior adjudications lapse, that is, they are not counted or scored, if they are beyond the five-year window. *See* § 7.11. A juvenile adjudication that has lapsed can never be revived. If a defendant in any Group was either sentenced or released from Oak Hill or its functional equivalent or, in Master Groups 1-5, released from a locked residential facility more than five years before the commission of the instant offense, it is not counted, regardless of the number of adjudications or convictions within the five-year window.

Example

Take a juvenile with the following series of placements on a single adjudication:

- (a) placed on probation;
- (b) probation revoked; committed to YSA and sent to a group home;
- (c) aftercare revoked; sent to a staff secure residential facility;
- (d) transferred to a locked residential facility;
- (e) transferred to Oak Hill;
- (f) transferred to a group home; and
- (g) released to aftercare to reside with his/her family.

The date of his or her release from Oak Hill would control the calculation of the five year window. If the instant offense was committed more than five years after the date of defendant's release from Oak Hill, this adjudication would lapse for scoring purposes.

Note: While a juvenile adjudication that has lapsed is not counted or scored for criminal history purposes, the court may still consider it when determining where a defendant should be sentenced within the applicable box.

Note: If a defendant is 26 years of age or older at the time of the instant offense, none of his or her juvenile adjudications are scored. Since all orders of the Family Court with respect to a juvenile terminates when he or she reaches 21 years of age, D.C. Code § 16-2322(f), there is no possibility of a disposition or release in the five-year window after a person's 26th birthday.

2.2.5 *Scoring Multiple Offenses in a Single Event*

Only the most serious offense arising out of *a single event* is scored. See § 7.10. This means, for example, that robbery and CPWL convictions arising out of the armed robbery of one or more victims in a single event, see § 8.9, would be scored at two points, since only the more serious offense, the robbery (Group 6), would be counted and not the less serious offense, CPWL (Group 8). However, a robbery and a CPWL arising out of multiple events -- even if they are both charged in a single case -- would be scored at three points, two for the robbery and one for the CPWL.

2.2.6 *Scoring Out-of-state Convictions/Adjudications*

Convictions and adjudications for federal and out-of-state offenses are scored like the closest comparable D.C. Code offenses. One guide is the name of the offense. Another guide is the elements of the offense. The Commission will be working on comparing Federal, Maryland and Virginia offenses to D.C. Code offenses and will provide a list of comparable offenses as soon as possible. Thereafter, it will work on comparability for the most common offenses in other jurisdictions. In the meantime, the Commission suggests that practitioners and judges call the Commission and ask for a decision on the comparability of specific offenses. If time or circumstances do not permit, practitioners and judges will have to decide comparability on a case-by-case basis.

Note: Figuring out exactly which D.C. offense most closely resembles an out-of-state offense may not be necessary if the number of criminal history points assigned to it would be the same regardless of whether it comes closer to one offense or another.

Note: Figuring out the exact number of criminal history points is not necessary where a defendant has six or more points (e.g., two prior violent felonies; three prior mid-level felonies; six prior low-level felonies or a combination of these and misdemeanors that add up to six or more points).

Note: If it is not possible to equate a federal or out-of-state felony offense to a D.C. Code offense, convictions should be scored at 1 point and adjudications should be scored at ½ point.

2.2.7 *Scoring Convictions/Adjudications for Offenses That Have Been Repealed*

Convictions and adjudications for offenses that have been repealed are scored in the same group as the closest comparable offenses in the current code. For example, Rape and Forcible Sodomy, which were repealed in 1994, were replaced by First-Degree Sexual Abuse. Rape would be ranked in Group 3 and Rape while Armed would be ranked in Group 2.

2.2.8 *Youth Rehabilitation Act Convictions, Convictions Reversed on Appeal, and Convictions Under Statutes Later Held to be Unconstitutional*

A conviction that has been set aside under the Youth Rehabilitation Act is counted.

A conviction/adjudication that was reversed on appeal is not counted.

A conviction/adjudication under a statute which has later been held to be unconstitutional is not counted.

2.2.9 *Defendant's Relationship to Criminal Justice System*

The defendant's status in the criminal justice system (*i.e.*, incarcerated, or on pre-trial release, probation, parole, pretrial or supervised release) at the time he committed the offense is not counted

in the criminal history score, although this status may be considered by the judge in choosing the appropriate sentence from the applicable box. Moreover, the sentence in the new case must be imposed consecutively to any sentence that the defendant was serving at the time he or she committed the offense. *See* Chapter 6.

2.2.10 Calculating the Overall Score

Using the principles set forth above, determine the number of points for the most serious offense arising out of a single event. Add the points for all such offenses together.⁷ This will yield the criminal history score that will inform you into which column the defendant falls:

| | |
|----------------|----------|
| 0 - ½ points | Column A |
| ¾ - 1 ¾ points | Column B |
| 2 - 3 ¾ points | Column C |
| 4 - 5 ¾ points | Column D |
| 6+ points | Column E |

The box at the intersection of criminal history point column and Offense Severity Group row contains the sentencing options for that conviction.

2.3 Criminal History Score Computation

CSOSA will compute the criminal history score as a part of the pre-sentence report. However, it may be advantageous, both in negotiating and evaluating plea agreements to know in advance what the criminal history score is likely to be. The bail report prepared by Pretrial Services generally contains reasonably accurate (although sometimes unverified and incomplete) information on prior and pending cases. Because of the short time frames in which this report is prepared, however, it is not always possible to verify the disposition in all cases where an arrest is registered. An effort will be made by the criminal justice agencies to ascertain whether it is possible to supplement this report fairly early in the process so that the parties will have complete and accurate information upon which to base plea negotiations and decisions. A conviction or adjudication that is “verified” by Pretrial Services, CSOSA, Youth Services Administration, Court Social Services, the U.S. Attorney’s Office, the defense attorney, or the court *presumptively* will be considered to be accurate. However, it may be challenged. If it is, additional documentation may be required. *See discussion below.*

During the Rule 11 inquiry, the judge should make clear what the maximum legal sentence for the offense is and inform the parties that he or she is not bound by the guidelines and may impose any sentence up to the statutory maximum. The court should also inform the parties that, in determining the appropriate guideline range, he or she will be bound by the true criminal history score of the defendant and not whatever the parties believe the criminal history score to be at the time of the plea. Thus, in situations where, despite the best efforts of the parties at an earlier stage of the process, additional information is disclosed at sentencing that would alter the criminal history score enough to move the defendant into a higher or a lower box for the offense of conviction, the judge must impose a sentence compliant with the actual guideline range. In other words, unless the parties and the judge have agreed to an 11(e)(1)(c) plea (or the judge exercises his or her discretion not to

⁷In most cases, the same criminal history score will apply to all of the convictions in a given case. However, there may be instances where there is more than 10 years between the completion of an earlier sentence and the commission of one offense and less than 10 years between the completion of an earlier sentence and the commission of another offense. This would yield two different criminal history scores. *See* § 9.12, Example 12.

sentence under the guidelines), the judge must use the defendant's actual criminal history when determining a guideline compliant sentence. Finally, the judge should inform the parties that how to apply the guidelines to any case is a matter within the sole discretion of the judge and that the defendant will have no right to appeal if he or she believes that the guidelines have been applied incorrectly. If information comes to light after sentencing that the judge applied the guidelines incorrectly but otherwise imposed a lawful sentence, the judge may modify the sentence under Rule 35 of the Superior Court Rules of Criminal Procedure on a timely filed motion, but the sentence cannot be appealed

Given the degree of overlap in prison ranges from box to box, as the criminal history score increases (or decreases) uncertainty about any particular prior conviction is unlikely to affect prison sentences very much one way or the other. That is, for example, the judge can impose the same compliant prison sentence whether the defendant properly belongs in Column B or Column C, although the sentence would obviously fall into a different part of the range depending on which column was used to determine the sentence. At the margin, however, a change in criminal history could move a defendant into or out of a probation permissible or short-split permissible Box and could lead to a marginally lower or higher sentence. Under such circumstances, a greater effort to verify prior convictions or adjudications is clearly advisable.

An adult conviction (including the date sentence was complete) will be considered verified if (a) the defendant affirms (or does not deny) it; (b) a certified conviction is provided to the judge; (c) other written documentation is provided to the judge,⁸ (d) oral representations are made to the judge by CSOSA, Pretrial Services, the U.S. Attorney's Office, the Department of Corrections, the Federal Bureau of Prisons, the United States Parole Commission, defense counsel, or any other reliable person, agency, or entity; or (e) other information is provided that satisfies the judge that the defendant was convicted of a particular offense (or the date sentence was complete). A party, agency, or entity relying on oral representations to verify or disprove a conviction (or date) should indicate the information is orally supported⁹ and be prepared, if asked, to provide the name, title, agency, and telephone number of the person from whom the information was obtained and the records from which the person derived the information. The party contesting a prior conviction should notify the opposing party and CSOSA as soon as it receives verification information that it intends to contest a conviction (or date) to allow the non-challenging party and/or CSOSA time to obtain additional documentation/ verification without the need to delay the sentencing hearing. If the judge finds a genuine contest as to a conviction or date that is orally verified, the judge may order the non-challenging party to provide additional written documentation to resolve the conflict or may order CSOSA to re-verify the disputed information. A judge may take judicial notice of the records of the Superior Court.

A juvenile adjudication (or the date the defendant was released from Oak Hill, its functional equivalent or, where relevant, a locked residential facility) generally can be verified and challenged by the same methods as adult convictions. In addition, oral representations may be made by Youth Services Administration and Court Social Services to verify an adjudication (or date). The date of release from a locked or multi-level residential facility can be established only through written documentation; oral representations will not suffice.¹⁰ If written documentation of a release date

⁸ For example, a fax on letterhead or email from an official government email address will suffice as written documentation.

⁹ An asterisk in the pre-sentence report, for example, should suffice.

¹⁰ The burden is on the defendant to establish the date of transfer from a locked to unlocked unit of a multi-level facility. This may be done by oral representations under the terms

within the five-year window cannot be obtained, then the date of disposition or the date of release from Oak Hill or its functional equivalent, whichever is later, will control for purposes of determining when the adjudication has lapsed.

Note: There may be situations where the parties and/or the judge disagree with respect to the criminal history score in a way that would place the defendant in different boxes but, because of the overlap in boxes, the difference might not be significant for the sentencing judge. In such cases, the judge may not need to decide the exact number of criminal history points in order to impose sentence. However, the judge should notify the Commission that the criminal history score was unresolved but the sentence imposed was in the overlap zone.

Note: There may also be situations where the parties disagree about the exact criminal history score, but the defendant would be in the same criminal history column either way. For example, the range in column C is from 2 to 3¾ criminal history points. If the prosecution claims that the defendant has been convicted of distribution of cocaine on three separate occasions (for a total of 3 points) and the defense claims that the defendant has only two such prior convictions (for a total of 2 points), he will be in column C regardless of which party is correct. In such cases, the judge may impose a sentence without resolving the dispute.

2.4 Challenging the Criminal History Score.

Sentencing hearings should be scheduled so that the pre-sentence report is completed and provided to both parties at least two weeks prior to the hearing to give the parties the opportunity to assess the accuracy of the guideline calculation.

If a party intends to challenge the accuracy of the criminal history score, that party should immediately notify the other party and CSOSA providing information on why the challenging party believes a particular conviction or date is incorrect. *See* § 5.2.5, Departure Procedures.

If a party knows that it will challenge the criminal history score and that it will submit evidence or information, not introduced at trial or a pretrial hearing, that the other party might want to contest, the moving party should notify the other party and the judge as early as possible so that sentencing will not have to be continued. The Commission anticipates that sentencing will proceed in the future much like it has in the past and that it would be the rare case where witnesses would be sworn or evidence taken in open court during the sentencing hearing.

and conditions as other oral representations.